FILED
JAN 17 1997
CLERK

No. 96-887

In the Supreme Court of the United States

OCTOBER TERM, 1996

WAKE COUNTY and EMMETT CURL,
in his capacity as Wake County Assessor, *Petitioners,*

v.

EDWARD VALVES, INC., *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

PETITIONER'S REPLY BRIEF

MICHAEL R. FERRELL*
County Attorney
SHELLEY T. EASON
Deputy County Attorney
N.C.S.B. #8251
P.O. Box 550
Raleigh, NC 27602
(919) 856-5500

* *Counsel of Record*

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In opposing the petition for certiorari in this case, respondent has remarkably little to say in defense of the judgment below. Instead, respondent attempts to confuse the issue here by denying that this Court has jurisdiction to review the case. This approach is perhaps understandable, given the patent inconsistency between the North Carolina Supreme Court's decision and this Court's holding in *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 115 S. Ct. 2351 (1995). But respondent's tactic should not succeed. Respondent's jurisdictional arguments are insubstantial, while its half-hearted suggestion that the decision below does not conflict with decisions of this and other courts cannot bear even cursory scrutiny. And respondent pointedly does not deny either that the issue here is a recurring one or that the North Carolina Supreme Court's decision likely will engender litigation across the Nation. Review of the decision below therefore is in order.

1. Respondent first asserts that the decision below is not final because upon remand it "will be entitled (a) to entry of summary judgment in its favor * * *, (b) to move for costs and attorney's fees * * *, and (c) to trial of its Seventh Claim concerning the assessment of its real property for the 1990 tax year." Br. in Opp. 6-7. This assertion entirely lacks merit.

(a) As respondent itself evidently recognizes, entry of summary judgment upon remand would be a wholly ministerial act. See Br. in Opp. 6 n.3 ("the determination of the North Carolina Court of Appeals clearly contemplates entry of summary judgment in favor of Edward Valves"). The prospect that judgment will be entered on remand therefore does not detract from the finality of the decision below. See, *e.g.*, *Department of Banking* v. *Pink*, 317 U.S. 264, 267 (1942).

(b) That respondent has yet to be awarded attorneys' fees does not call into question the finality of the North Carolina Supreme Court's decision that Section 1983 provides a cause of action here. At this point, the Section 1983 issue cannot

be revisited when respondent makes its fee request. As a consequence, this quite plainly is a case "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state court proceedings." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 480 (1975). See *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 907 n.42 (1982); *Brady* v. *Maryland*, 373 U.S. 83, 85 n.1 (1963).

(c) The trial of respondent's real property assessment claim also has no bearing on the Section 1983 issue decided by the court below. That claim did not involve any federal issue and, indeed, did not proceed under Section 1983. It therefore is simply unrelated to the finality of the state supreme court's decision. See, *e.g.*, *American Export Lines, Inc.* v. *Alvez*, 446 U.S. 274, 278 n.7 (1980).

2. Respondent's contention (at Br. in Opp. 8-10) that the decision below rests on an independent and adequate state ground is nonsensical. The *only* question before the North Carolina Supreme Court was a federal one: whether Section 1983 may be used to challenge state taxes. The court in fact dismissed as improvidently allowed the state law issues on which it initially granted review. See Pet. 3 n.1. Needless to say, it is difficult to see how a decision about the meaning of a federal statute could be said to rest on nonfederal grounds.

In making its argument, respondent appears to believe that the holding below rests on state grounds because (in respondent's view) equivalent relief may be available under state and federal statutes. But respondent's contention involves a fundamental misunderstanding of the adequate and independent state ground doctrine. As a general matter, the "possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law does not create an adequate and independent state ground that relieves the Court of the necessity of considering the federal question" (*United Air Lines* v. *Mahin*, 410 U.S.

623, 630-631 (1973)); that the state court "might have, but did not, invoke state law does not foreclose jurisdiction here." *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977). In this case the state court expressly construed Section 1983, and its erroneous construction of that statute may be corrected by this Court.

3. Respondent maintains that the decision below does not conflict with *National Private Truck Council* or with the many state court decisions cited at Pet. 7-8 because "the North Carolina Supreme Court held, at least implicitly, that North Carolina's statutory and administrative remedies were not adequate." Br. in Opp. 11. This argument, however, rests on a plain misreading of the decision below. Far from finding North Carolina's remedies inadequate, the state supreme court expressly declared state remedies "irrelevant" (Pet. App. 10a), holding that taxpayers "may pursue Section 1983 remedies regardless of the state statutory or administrative remedies provided for by the North Carolina Machinery Act." *Id.* at 11a. The holding that state remedies are irrelevant is, of course, irreconcilable with *National Private Truck Council* and the many state court decisions that have followed it. It may be added that the court below plainly did regard North Carolina's remedies as adequate: the court cited with approval the decision in *Johnston* v. *Gaston County*, 323 S.E.2d 381 (N.C. App. 1984), which expressly held the State's remedies adequate under the Tax Injunction Act. See Pet. App. 7a. Moreover, the court hardly would have declared adequacy irrelevant had it thought the State's remedies inadequate.[1]

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[1] Respondent's suggestion (at Br. in Opp. 11-12) that the North Carolina Supreme Court's decision in *Swanson* v. *North Carolina*, 441 S.E.2d 357, cert. denied, 115 S. Ct. 662 (1994), somehow expressed doubt about the adequacy of the State's remedies is most peculiar. In fact, the court there held that the refund statute at issue (not, in any event, the one used by respondent in this case)

4. In sum, the holding below squarely conflicts with *National Private Truck Council* and with the decisions of many state courts. It finally and unambiguously resolves an important and recurring question of federal law, holding that Section 1983 may be used to challenge the constitutionality of state taxes even when an adequate state law remedy is available. It threatens to interfere with the mechanisms of state tax administration and will have mischievous effects across the Nation. Further review therefore is in order. Indeed, respondent has offered no reason to doubt that summary reversal would be an appropriate disposition of this case.

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was "free from any constitutional infirmity" (*id.* at 543); the court concluded that it provided a "clear and certain remedy and meaningful, backward-looking relief," as well as "a clear and fair opportunity to contest the tax." *Id.* at 545. Respondent also is wrong in arguing (at Br. in Opp. 11-12) that its delay in obtaining a refund might have been thought by the state supreme court to render North Carolina's remedies inadequate. The court, of course, said no such thing. And this Court has held that substantial delays in paying refunds do not make remedies inadequate, *even when the State does not pay interest on refunds that eventually are awarded*. *Rosewell* v. *LaSalle National Bank*, 450 U.S. 503, 520-521 (1981). Here, in contrast, the state statute provides for interest. See Pet. 2. In addition, respondent had the option of not paying the tax at all and instead seeking immediate administrative review, with an appeal of any adverse judgment to the state court of appeals. See Pet. 1.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted and the Court should consider summarily reversing the decision of the Supreme Court of North Carolina.

Respectfully submitted.

MICHAEL R. FERRELL*
County Attorney
SHELLEY T. EASON
Deputy County Attorney
N.C.S.B. #8251
P.O. Box 550
Raleigh, NC 27602
(919) 856-5500

* *Attorney of Record*

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